



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Colt Industries Inc.  
File: B-230012  
Date: March 28, 1988

### DIGEST

1. Protest after award that specifications were unjustifiably restrictive is untimely, regardless of whether the protester's pre-closing date letter to the agency questioning specifications is considered a protest. If the letter is not considered a protest, then the protester failed to protest apparent solicitation improprieties before the closing date for receipt of proposals, as required by Bid Protest Regulations. Alternatively, if the letter is considered a protest, then the protester failed to protest to the General Accounting Office within 10 working days of initial adverse agency action--receipt of proposals--as further required under the protest regulations.
2. Where the protester's nonconforming proposal could not have been accepted, allegations of improper evaluation and violation of the Buy American Act did not prejudice the firm and therefore will not be considered.

### DECISION

Colt Industries Inc. protests the award of a contract to Gun South, Inc., under request for proposals (RFP) No. CS-87-090, issued by the Customs Service to acquire rifles. We dismiss the protest.

The RFP contained a list of mandatory and desired features. The mandatory features included such items as a minimum 16-inch barrel length, maximum overall length of 27.5 inches, fixed synthetic buttstock, and open, illuminated fixed sights integral with a 1.5 power optical sight/handle with circle reticle. Proposals satisfying the mandatory requirements were to be evaluated on the basis of desired features (40 points), early delivery (10 points) and cost (30 points).

By letter dated September 3, 1987, to the Customs Service, Colt alleged that the specifications essentially described the Steyr AUG, a specific model of firearm. Colt's letter

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proposed changes to the specifications to accommodate its own weapons and stated that Colt would protest the RFP if a contract were awarded to Steyr without definite consideration of other offerors in the form of a solicitation amendment.

The Customs Service did not amend the RFP in response to Colt's letter, but accepted proposals on September 10, as scheduled. Best and final offers were received on November 12. On January 4, 1988, the Customs Service awarded the contract to Gun South for the Steyr AUG.

Colt, after a debriefing, protested to our Office on January 15 that the specifications in the RFP were unjustifiably restrictive and exceeded the agency's minimum needs. As an example, Colt argued that the Customs Service established the mandatory requirements for a minimum 16-inch barrel, 27.5 inch overall length, and fixed buttstock, without performing any tests to verify them. After receipt of the Customs Service's report on the protest, Colt raised two new contentions--that the evaluation of proposals was flawed because the Customs Service failed to consider option quantities in evaluating price, and that the award of the contract violated the Buy American Act.

The Customs Service contends that the alleged RFP improprieties to which Colt objects were apparent on the face of the solicitation and argues that Colt therefore was required, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1987), to file its protest before the closing date for receipt of proposals. The Customs Service contends that since Colt did not do so, Colt's protest is untimely.

We agree that the protest is untimely. As the Customs Service notes, our Regulations require that a protest of improprieties apparent in an RFP must be filed before the next closing date of the solicitation. 4 C.F.R. § 21.2(a)(1). If we do not consider Colt's letter of September 3, 1987, to the Customs Service to be a protest, then Colt's protest to our Office in January of 1988 clearly was untimely because it was filed after the closing date for the RFP.

Alternatively, if we construe Colt's letter of September 3 as a pre-closing date protest to the agency, then Colt was required by our Regulations to protest to our Office within 10 working days of initial adverse action by the Customs Service on the protest. 4 C.F.R. § 21.2(a)(3). The agency's receipt of proposals without changing the specifications to which Colt objected would have constituted

initial adverse agency action, Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 CPD ¶ 357, aff'd, B-221980.2, May 28, 1986, 86-1 CPD ¶ 495, and Colt's protest to our Office would be untimely because it was not filed within 10 working days afterward. Consequently, whether or not we consider Colt's letter of September 3 to be a protest to the agency makes no difference, since Colt's protest to our Office is untimely in either case.


We note that Colt asserts that in response to its September 3, 1987, letter objecting to the specifications, the Customs Service contracting officer requested that Colt not file a preaward protest and assured Colt that any bias in the RFP would be eliminated in the evaluation of proposals. Colt contends that the bias was not "apparent," therefore, until Colt learned of the award of the contract and was debriefed. We are unpersuaded, however, of the reasonableness of Colt's professed reliance on the contracting officer's purported advice. The RFP contained explicit, required, design specifications with which Colt's weapon clearly did not comply, and which the Customs Service would have had to ignore in order to accept Colt's proposal. It is axiomatic that agencies are not free to ignore or deviate from mandatory requirements or accept noncomplying offers, see W.D.C. Realty Corp., B-225468, Mar. 4, 1987, 66 Comp. Gen. \_\_\_\_\_, 87-1 CPD ¶ 248, or evaluate proposals on a basis other than the one stated in the RFP. Greenebaum and Rose Associates, B-227807, Aug. 31, 1987, 87-2 CPD ¶ 212. Colt's purported reliance on a remark that would have required the agency to take actions contrary to the clear meaning of the RFP was unreasonable.

In short, Colt responded to an RFP containing mandatory specifications clearly precluding the acceptability of Colt's weapons and continued its participation in the procurement without protest to our Office until Colt learned of the award of the contract to a competitor. It would be inimical to the fundamental purpose of our Bid Protest Regulations--to assure the speedy resolution of protests without undue disruption of the federal procurement process--to review, at this time, Colt's contention that the specifications exceeded the agency's minimum needs.

Finally, we will not consider Colt's arguments concerning the evaluation of proposals and the Buy American Act's applicability. Colt's offer did not satisfy the mandatory

requirements of the specifications and, therefore, could not have been accepted in any event, so that these alleged improprieties did not prejudice the firm.

The protest is dismissed.



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